IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 1.12.2004

CORAM:

THE HONOURABLE MR.JUSTICE P.D.DINAKARAN
AND
THE HONOURABLE MR.JUSTICE F.M.IBRAHIM KALIFULLA

W.A.Nos.125 to 127 of 1999 and 532 of 1996

W.A.No.125 of 1999:
1. The State Tamilnadu
   rep. by the Commissioner & Secretary
   Prohibition and Excise Department
   Fort St.George, Madras-9.

2. The Assistant Commissioner (Excise)
   Collector's Office, Madras.

3. The Collector of Madras,
   Collectorate, Madras. .. Appellants/Respondents

Vs

M/s.Alfred Berg & Co. (I) Pvt. Ltd.
1, Hunters Road, Madras-7, rep. by
its Managing Director, Chandrakant. .. Respondent/Petitioner

W.A.No.126 of 1999:
1. The State Tamilnadu
   rep. by the Commissioner & Secretary
   Prohibition and Excise Department
   Fort St.George, Madras-9.

2. The Collector and Assistant
   Commissioner of Excise,
   Chingleput District
   Chingleput.

3. The Bonded Manufactory Officer

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M/s.Scortch Pharmaceutical Works
9, Lawyer Jagannathan Street
Alandur, Madras-32. .. Appellants/Respondents

Vs

M/s.Scortch Pharmaceutical Works
(A Proprietorship Concern) by its
Proprietor K.J.Suresh
9, Lawyer Jagannathan Street
Alandur, Madras-32. .. Respondent/Petitioner

W.A.No.127 of 1999:

1. The State Tamilnadu
   rep. by the Commissioner & Secretary
   Prohibition and Excise Department
   Fort St.George, Madras-9.

2. The Assistant Commissioner (Excise)
   Collector's Office, Madras.

3. The Collector of Madras,
   Collectorate, Madras. .. Appellants/Respondents

Vs

M/s.Kousalya Pharmaceuticals (P) Ltd
242, Kilpauk Garden Road
Madras-10, by its Managing Director
D.Surishankar .. Respondent/Petitioner

PRAYER in W.A.Nos.125 to 127 of 1999: Against the order the learned single Judge dated 13.9.1991 made W.P.No.4790 of 1984, W.P.No.778 of 1988, W.P.No.6583 of 1984.

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W.A.No.532 of 1996:

1. The State Tamilnadu
   rep. by the Commissioner & Secretary
   Prohibition and Excise Department
   Fort St.George, Madras-9.

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2. The Assistant Commissioner (Excise)
   Collector's Office, Madurai.

3. The Commissioner for Prohibition
   and Excise, Chepauk, Madras-5. .. Appellants/Respondents

Vs

M/s.Solar Pharmaceuticals (P) Industries
rep. by its Managing Partner
T.Raghavan, By-Pass Road
Madras - 600 016. .. Respondent/Petitioner

PRAYER: Appeal against the order of the learned Single Judge dated 1.11.1995 made in W.P.No.8782 of 1985.

For Appellants	:	Mr.R.Muthukumarasamy Addl. Advocate General assisted by Mr.D.Krishnakumar, Spl. Government Pleader
For Respondent in WA: 127/99	:	Mr.G.Masilamani, Senior Counsel for M/s.G.M.Associates
For Respondent in WA:532 of 1996	:	Mr.T.P.Manoharan
in WA 125/99	:	Mr. S. Ramasamy

J U D G M E N T

(Judgment of this Court was delivered by P.D.DINAKARAN,J.)

I - SUBJECT MATTER OF THE APPEAL

The Writ Appeal Nos.125, 126 and 127 of 1999 are directed against the common order dated 13.9.1991 made in a batch of writ petitions viz., W.P.Nos.4790 of 1984, 778 of 1988 and 6583 of 1984, and Writ Appeal No.532 of 1996 is directed against the order dated 1.11.1995 made in W.P.No.8782 of 1985.

2. The appellants herein are the respondents in the above writ petitions filed by the respondents herein. For the purpose of convenience, the parties are arrayed as per

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their rank in the writ petitions. While the petitioners in W.P.No.4790, 6583 of 1984 and 778 of 1988 sought for a declaration to declare Rule 11 of the Tamil Nadu Rectified Spirit Rules, 1959 (hereinafter referred to as "the Rectified Spirit Rules, 1959") as amended by G.O.Ms.No.19, Prohibition and Excise (III) Department, dated 6.1.1983 as invalid in law and to forbear the respondents from demanding and collecting the cost of establishment charge of the Bonded Manufactory Officer and B.G.S employed in the bond of the petitioners from 1.4.1983, the petitioner in W.P.No.8782 of 1985 sought for a Writ of Mandamus to forbear the respondents from demanding or collecting the cost of the establishment charges of the Bonded Manufactory Officer deputed to the petitioner.

II - STATUTORY PROVISIONS

3. The Rectified Spirit Rules, 1959 were framed in exercise of the powers conferred under Sections 16, 17-B, 18, 18-B, 21 and 54 of the Tamil Nadu Prohibition Act (hereinafter referred to as "the TNP Act"), superseding the Tamil Nadu Rectified Spirit Rules, 1937. Under Section 16 of the TNP Act, the State Government is empowered, by notification and subject to such conditions as they think fit, to exempt any specified liquor or intoxicating drug or article containing such liquor or drug from the observance of all or any of the provisions of this Act on the ground that such liquor, drug or article is required for a medicinal, scientific, industrial or such like purpose. Section 17-B of the TNP Act empowers the State Government, or subject to their control, the Collector, to issue license to any person or any institution whether under the management of the Government or not, (a) for the manufacture of liquor for human consumption- (i) for the purpose of sale to persons and institutions who hold permits or licenses for sale of such liquor; (ii) for other purposes permitted under this Act; or (b) for the import, export or transport of liquor for human consumption. Section 17-C of the TNP Act empowers the State Government to grant exclusive privilege of manufacture on such conditions and for such period as they may deem for (a) of manufacturing Indian-made foreign spirits; or (b) of selling by retail Indian-made foreign spirits. Section 17-

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C [1-A](a) of the TNP Act provides the exclusive privilege of supplying by whole sale Indian-made Foreign Spirits to the Tamil Nadu State Marketing Federation. Section 17-D of the TNP Act provides the levy of sum or fee or both in consideration of the grant of any exclusive or other privilege under Section 17-C and also a fee on licenses granted under Section 17-C of the TNP Act. Section 17-E of the TNP Act empowers the State Government or subject to the control of the State Government, the Collector, to issue licenses to any person or in respect of any institution whether under the management of the Government or not, for the export, import, transport or possession of any liquor or article containing such liquor on the ground that such liquor or article is required by such person or in respect of such institution for a bona fide purpose. Section 18 of the TNP Act empowers the State Government or subject to the control of the Government, the Collector, to issue licenses to any person or in respect of any institution whether under the management of Government or not, for the manufacture, export, import, transport, sale, possession of any liquor, intoxicating drug or article containing such liquor or drug on the ground that such liquor, drug or article is required by such person in respect of such institution for a bona fide medicinal, scientific or industrial or such like purpose. Section 18-A of the TNP Act provides the Government to levy the excise duty or countervailing duty on all liquors, intoxicating drugs permitted to be imported, exported, transported, manufactured, issued from any manufactory or institution or sold under the provisions of this Act, or any rule, notification, license or permit issued thereunder. Section 18-B of the TNP Act provides for levy of excise duty or countervailing duty on excisable articles. Section 18-C of the TNP Act provides ways of imposing duty under Section 18-B of the TNP Act. Section 21 of the TNP Act empowers the Government to impose such restrictions, limitations or conditions for grant of licenses or permits under Section 6-A, 17-B, 17-C, 18, 19 and 20 of the TNP Act. Section 54 of the TNP Act provides rule making power for the Government for the purpose of carrying into effect the provisions of this Act and for other purposes mentioned thereunder including the purpose which is relevant for the issue raised in these writ

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petitions viz., for prevention of the use of medicinal or toilet preparations for any other purpose other than medicinal or toilet preparations and for the regulation of the use of any liquor or drug exempted from all or any of the provisions of this Act. Exercising these powers, the Government of Tamil Nadu framed the Rectified Spirit Rules, 1959, of which we are concerned. Rule 11 of the Rectified Spirit Rules, 1959 deals with the issue of licenses and permits, which is, of course, subject to Rule 10 of the Rectified Spirit Rules, 1959, which reads thus,

> "Nothing in these rules shall alter the operation of the Medicinal and Toilet Preparation (Excise Duties) Act, 1955 (Central Act No.16 of 1995) or the rules made thereunder."

4. It is also relevant to refer that the Parliament, in order to provide for levy and collection of duties of excise on medicinal and toilet preparations containing alcohol, narcotic drug or narcotic, enacted the Medicinal and Toilet Preparations (Excise Duties) Act by repealing the State law by which the duties and excise are imposed on medicinal and toilet preparations containing alcohol. In other words, the main object of the Medicinal and Toilet Preparations (Excise Duties) Act, 1955 (hereinafter referred to as "the MTP Act") is to collect duty. Section 19 of the MTP Act empowers the State Government to make rules for the purpose of the Act and for other purposes mentioned thereunder. Exercising such power, the Central Government framed the Medicinal and Toilet Preparations (Excise Duties) Rules, 1956 (hereinafter referred to as "the MTP Rules"). Rule 2(iii) and Rule 2(iv) of the MTP Rules, which define the "bonded manufactory" and "non-bonded manufactory", are extracted below for the purpose of these writ petitions.

> "Rule 2(iii) : "bonded manufactory" means the premises or any part of the premises approved and licensed for the manufacture and storage of medicinal and toilet preparations containing alcohol, narcotic drugs or narcotics, on which duty has not been paid;
>
> Rule 2(iv) : "non-bonded manufactory" means he premises or any part of the premises approved and

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licensed for the manufacture and storage of medicinal and toilet preparations containing alcohol, narcotic drugs or narcotics, on which duty has been paid;"

Rule 21 of the MTP Rules provides for issue of rectified spirit without payment of duty for the manufacture of medicinal and toilet preparations containing alcohol subject to the conditions that the manufacturer enters into a bond in Form B-1 with sufficient security, as laid down in Rule 96 towards due payment of duty and observance of the rules. Rule 23 of the MTP Rules provides for the essentials of a bonded manufactory. Rules 40 to 45 of the MTP Rules refer to the officer in-charge of the bonded manufactories, maintenance of accounts in proper forms and registers, size of establishment, collection of duty and penalty etc., which read as follows:

"Rule 40: Issue from a bonded manufactory.-

(1) Issues of alcoholic preparations and preparations containing narcotic drugs or narcotics shall be made from a bonded manufactory on payment of duty. The licensee shall present before the office-in-charge an application in Form A.R.-2 signed by him or by his authorised representative. The officer-in-charge shall, after checking the entries and realising the duty payable, allow the required quantities to be removed after issuing a permit:

Provided that issues to another bonded warehouse shall be made without payment of duty under proper security governed by the rules in Chapter VII and VIII.

(2) If the licensee is also an account holder as provided for in rule 9, duty leviable on alcoholic preparations and preparations containing narcotic drugs or narcotics to be issued from a bonded manufactory shall be debited in account-current before the preparations are removed from the bonded premises.

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Rule 41: The licensee to maintain proper accounts etc. -
(1) The licensee shall maintain accounts in proper forms and registers as prescribed in the Appendix to these rules.

(2) The licensee shall deliver to the officer-in-charge by the 5th of each month, a return of transactions of business in respect of the preceding month in Form R.T.1.

Rule 42: Size of establishment.- It shall be open to the Excise Commissioner to determine the size of the supervisory staff in consultation with the licensee.

Rule 43: Accounts.- The officer-in-charge shall maintain account in the prescribed forms and shall take steps to ensure that the licensee also maintains accounts. Separate accounts shall be written up daily by the officer-in-charge and the licensee or by any person authorised by him and shall be compared and reconciled before the manufactory is closed at the end of the day's transactions.

Rule 44: Collection of duty.- The officer-in-charge shall be responsible for the correct collection of duty and penalty, if any, at the prescribed rate before any medicinal or toilet preparations containing alcohol are allowed to be removed from the premises except in the case of exports or removal under bond or under such conditions as may be permitted by the Excise Commissioner.

Rule 45: Scope of duties.- The officer-in-charge shall exercise such supervision as is required to ensure that alcohol issued for a certain preparation is added to the materials which go to make that preparation and that no portion of such alcohol is diverted to other purposes.

(2) Agents, clerks, compounders and other persons, who have been duly authorised in this behalf by the

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licensee, and approved by the officer-in-charge, may enter into and carry out their work in connection with the manufacture during the working hours of the manufactory.

(3) Any person duly authorised in this behalf by the licensee may sign all applications and indents for the issue of rectified spirit or finished preparations.

(4) Excise Officer, specially empowered in this behalf, by the Excise Commissioner, shall inspect the manufactory in accordance with the instructions prescribed herein and shall submit the notes of their inspection to the officer specified by the Excise Commissioner. They shall also be responsible for the correct maintenance of accounts and collection of duty by the officer-in-charge."

(emphasis supplied)

III – IMPUGNED RULE

5. Under the scheme of the MTP Act and the MTP Rules, the method of manufacture of medicinal preparations containing alcohol are thus classified into two groups, namely manufacture 'inside bond' and manufacture 'outside bond'. If the duty not paid alcohol is used in the manufacture, it will fall under the classification 'outside bond'. The goods manufactured shall be cleared on the request of the manufacturers by the Excise Officer on payment of duty imposed under the Act and the establishment charges of the Excise Officer are borne by the Government. So far as the goods manufactured by the 'inside bond' method are concerned, the finished products shall be cleared by the Excise Officer on the request of the manufacturer on payment of duty imposed under the Act, and inasmuch as duty not paid alcohol is used in the 'inside bond' manufacture method, the Excise Officers are deputed to the manufactory by the Government to keep control and watch over the duty not paid alcohol purchased, stored and used by the manufacturer in order to prevent abuse of alcohol and the charges incurred in respect of these Excise Officers deployed at the Bonded Manufactory are sought to be recovered from the manufacturer of medicinal

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preparations, as proposed under G.O.Ms.No.19, Prohibition and Excise (III) Department dated 6.1.1983, which is impugned in these writ petitions, by inserting Clause (c) to Rule 11 of the Rectified Spirit Rules, 1959, which reads as follows:

> "Rule 11(c) : All the transactions in the bonded spirit store shall be conducted only in the presence of Bonded Manufactory Officer appointed by the Government of Tamil Nadu. The cost of the Bonded Manufactory Officer and the allied staff employed including leave salary and pension contribution, shall be payable by the licensee in advance in the first week of every month as per countersigned challan to be obtained from such officer. The rate at which the cost of establishment is to be paid by the licensee shall be fixed by the Commissioner from time to time and intimated to the licensee in writing. If the licensee fails to remit the cost of establishment in the first week, the licensing authority may take action for cancellation of license in the manner prescribed in sub-rule (vi) of Rule 13 of these Rules and when the license is cancelled, the staff shall be withdrawn."
>
> (emphasis supplied)

IV - GRIEVANCES & CONTENTIONS OF THE RESPECTIVE PARTIES

6.1. According to the petitioners, the power conferred on the State Legislature to impose duties on intoxicating liquors excludes from its purview of medicinal and toilet preparations containing alcohol. Hence, the State legislature has absolutely no power to make any legislation on medicinal and toilet preparations containing alcohol including right to impose any duty, tax, charge or levy.

6.2. Secondly, even though the Government was empowered to make Rectified Spirit Rules, 1959 exercising the power conferred under Sections 16, 17-B, 18, 18-B, 21 and 54 of the TNP Act with effect from 1.4.1959, they do not have legislative competency to bring the impugned amendment made by G.O.Ms.No.19, Prohibition and Excise (III) Department dated 6.1.1983, which is applicable to persons engaged in the manufacture of Medicinal and toilet

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preparations and to call on them to take license under Rule 11(a) of the Rectified Spirit Rules, 1959 in Form RL on payment of fee for the purpose of purchasing, storing and using rectified spirit in the manufacture of medicinal preparations containing alcohol, in addition to the license in Form L1 obtained under the Central Act for the very same purpose. It is, therefore, contended that the presence of the Excise Officer at the manufactory is absolutely unnecessary, superfluous and the same is not for the benefit of the petitioners.

6.3. Thirdly, it is contended that once the retail price of the medicinal preparations are governed under the Drug Price (Control) Order, 1979 and the price of the medicinal preparations are fixed under the formula provided thereunder, the establishment charges now proposed to be borne by the petitioners in respect of the Excise Officers, who were deputed under the impugned Rules, cannot be taken into account and as a result, the petitioners are constrained to bear the said cause personally, which is again arbitrary and unreasonable.

6.4. Fourthly, it was contended that the impugned Rule does not provide any guidelines for the State to recover the cost of the staff employed at the Bonded Manufactory from the licensees concerned uniformly, which in turn violates Article 14 of the Constitution of India.

6.5. Lastly, it was contended that the unilateral deputation of the Excise Officers to Bonded Manufactory is only to watch and control the spirit stores of the licensees without rendering any service whatsoever to the licensee in the name of allegedly preventing the abuse of alcohol is unreasonable.

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7.1. Per contra, the respondents-State resisted the above contentions made on behalf of the petitioners on the grounds that, if the petitioners choose to obtain L2 license in stead of L1 license under the MTP Rules he can use duty paid alcohol and there will be no necessity for appointment of Bonded Manufactory Officer and consequently, the payment of cost of establishment charges of Excise Staff would not arise. On the other hand, if the licensee

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obtained L1 license, and proposed to use duty not paid alcohol, their transactions are liable to be supervised and scrutinized by the Officer-in-charge, namely the Bonded Manufactory Officer, for the functions under Rule 40 to 45 of the MTP Rules, referred to supra.

7.2. As there cannot be any second opinion as to the powers of the State Government in framing the Rectified Spirit Rules, 1959, exercising the powers conferred under Sections 16, 17-B, 18, 18-B, 21 and 54 of the TNP Act, equally such power is extendable to bring the impugned amendment inserting Rule 11(c) of the Rectified Spirit Rules, 1959, referred to above.

7.3. It was further contended that the grievance of the petitioners that the expenses borne by them for the establishment charges and other incidental charges for the Bonded Manufactory Officers as per the impugned rules as may be fixed by the Commissioner from time to time in writing, cannot be included in the retail prices of the medicinal preparations governed under the Drugs Price (Control) Order, 1979 and consequently, they have to bear the said expenses personally cannot be accepted as the licensees are always at liberty to apprise the above facts to the authorities concerned to bring the impugned establishment charges under the calculation of retail prices of formulations prescribed under clause 7 of the order. If their claim to include the expenses for calculating the retail prices is rejected, they are still at liberty to work out their remedies in appropriate proceedings, if they are so advised, under the provisions of the Drugs Price (Control) Order, 1979.

7.4. Similarly, the contention that the impugned rule does not provide for any guideline for fixing the charges to be borne for the appointment of the Bonded Manufactory Officers with reference to the capacity of the units, was also resisted on the ground that the apprehension of the petitioners in this regard is illegal, misconceived and unwarranted as the rule itself provides that the rates at which the cost of establishment shall be fixed by the Commissioner from time to time and the same shall be intimated to the licensee in writing. If the petitioners

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are aggrieved by such fixation of the rates, again they are at liberty to work out their rights separately insofar as the implementation of the rules are concerned. But, such a grievance in implementing the Rule cannot be quoted to challenge the rule itself, on the ground of discrimination in fixing the rates with reference to the capacity of the units, which is obviously hypothetical.

7.5. In view of Rule 10 of the Rectified Spirit Rules, 1959, as well as the power conferred on the Bonded Manufactory Officer's under Rules 40 to 45 of the MTP Rules, it is contended that the impugned amendment is to complement the provisions of the Central Act but not in conflict with the same, because even though the MTPS Act was enacted by the Parliament, the enforcement of the same for levy, collection and appropriation of the duty imposed and collected under the Act is left to the State Government. Once the said position is clear, a statutory obligation falls on the licensee to bear the establishment charges of Bonded Manufactory Officers and the basic government servants appointed in the respective units. Since the appointment of the Bonded Manufactory Officers in the case of Form 'C' licensees who use duty not paid alcohol for the medicinal and toilet preparations is meant to discharge the functions and duties of the Bonded Manufactory Officers prescribed under Rule 40 to 45 of the MTP Rules, it cannot be said that they do not render any service to the petitioners' units.

V - FINDINGS & DECISION OF THE LEARNED SINGLE JUDGE

8. The learned single Judge accepting the contentions of the State/appellant herein that the impugned rule is only to complement the provisions of the MTP Act and Rules, particularly Rule 40 to 45 of the MTP Rules, which deal with the powers and functions of the Bonded Manufactory Officers, but not to conflict with the same, held the said rule to be constitutionally valid. However, if the collection of the establishment charges from the licensees can be construed as a fee as a quid pro quo for the services rendered for the purpose of ensuring that (i) the denaturing is done properly in the manufacture of the

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preparation of medicinal and toilet preparations; and (ii) after the said purpose, the subsequent possession of the denatured spirit in the hands of the wholesale seller, or retail seller, or any other seller or permit holder is not misused by converting the denatured spirit into alcohol for human consumption and thereby evading payment of heavy duty, such cost of supervising manufactory process or any other assistance rendered by the Bonded Manufactory officers cannot be borne unless the licensees are benefitted by the services rendered by these officers. Finding that no materials were placed by the Government/appellant herein for having rendered any services to the licensees in that regard, the learned single Judge, while holding the impugned rule as valid, held that the same is not applicable to the petitioners on the ground that they are not benefitted by any service rendered by the Bonded Manufactory Officers and therefore, the demand of establishment charges under the impugned rule cannot be enforceable in law. Hence, the above writ appeals.

VI – CONTENTIONS ON BEHALF OF THE RESPECTIVE PARTIES IN THE WRIT APPEALS

9. Both Mr.R.Muthukumaraswamy, learned Additional Advocate General, appearing on behalf of the respondents/State Government as well as Mr.G.Masilamani, learned Senior Counsel appearing on behalf of the petitioners, reiterated the submissions made on behalf of the respective parties before the learned single Judge.

10. Mr.G.Masilamani, learned senior counsel, to substantiate the said contentions made on behalf of the petitioners in the writ petitions, strongly placed reliance on the decisions reported in:

(i) H.C. & P. Works Ltd. v. State of A.P., AIR 1964 SC 1870;

(ii) Southern Pharmaceuticals v. State of Kerala, AIR 1981 SC 1863; and

(iii) Synthetics & Chemicals Ltd. v. State of U.P., AIR 1990 SC 1927,

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to contend that the liability under the impugned Rule 11(c) of the Rectified Spirit Rules, 1959 lacks legislative competency and also quid pro quo and cannot be justified as a fee at all.

11. On the other hand, Mr.Muthukumarasamy, learned Additional Advocate General, placing reliance on Southern Pharmaceuticals v. State of Kerala, AIR 1981 SC 1863, submits that the said decision relied upon by the writ petitioners, in fact, supports the case of the appellants/ Government and further adds that the law on the point with respect to the legislative competency of the State to frame the rules as well as with respect to the concept of quid pro quo are now well settled as per the decisions in:

(i) Synthetics & Chemicals Ltd. v. State of U.P., AIR 1990 SC 1927;

(ii) Vam Organic Chemicals Ltd. v. State of U.P., 1997 (2) SCC 715;

(iii) B.S.E. Brokers' Forum, Bombay v. Securities and Exchange Board of India, (2001) 3 SCC 482 = AIR 2001 SC 1010; and

(iv) State of U.P. v. Vam Organic Chemicals Ltd., (2004) 1 SCC 225 = AIR 2003 SC 4650,

and therefore, the impugned Rule is not only constitutionally valid, but also applicable to and enforceable against the petitioners.

VII – ISSUES THAT ARISE FOR CONSIDERATION

12.1. We have given careful consideration to the submissions made on behalf of both sides.

12.2. On the above rival contentions, the following issues arise for our consideration:

(i) Whether Rule 11(c) of the Rectified Spirit Rules, 1959 is constitutionally valid? and

(ii) Assuming Rule 11(c) of the Rectified Spirit Rules, 1959 is constitutionally valid, whether the same is applicable to and enforceable against the

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petitioners?

VIII – ISSUE (i) & THE LEGAL POSITION

13. Issue (i) - Whether Rule 11(c) of the Rectified Spirit Rules, 1959 is constitutionally valid?

14. It is a settled law that no one has got a fundamental right to the supply of rectified spirit, which is an intoxicating liquor. It is up to the State to control and regulate its supply from distillery or a spirit warehouse in the State and in accordance with the terms and conditions of the license or permit, its import from outside by grant of privilege and charge fee for the same. A fee may be charged under the privilege or benefit conferred or service rendered or to meet the expenses connected there with. A fee may be levied to meet the cost of supervision that may be something more. It is in consideration for the privilege, license or service, the State is undoubtedly entitled to levy excise duty on the rectified spirit raised from the distillery.

15. It is true, the Constitution Bench of the Apex Court in H. C & P. Works Ltd. v. State of Andhra Pradesh, AIR 1964 SC 1870, whereunder Rule 36 of the Medicinal Preparations and Spirituous Rules which provides that the expenses of the establishment for the supervision of the work shall be borne by the pharmaceutical laboratory (licensee), was challenged on the ground that the same is not saved by the proviso to Section 21 of the MTPS Act, 1955, which deals with repeals and savings, even though observed that supervisory staff will certainly see that the alcohol supplied is used for the purpose for which it is supplied and it is not used for any other purpose and Rule 36 of the Medicinal Preparations and Spirituous Rules was only concerned to see that the manufacture of medicinal preparations is made properly and is done under the supervision of the establishment attached to each laboratory and incidentally, the establishment is also to see the alcohol supplied is not used otherwise than the purpose of manufacture, as the MTPS Act, 1955 and the Rules framed thereunder make no provision for any such charge as provided under Rule 36 of the Medicinal Preparations and

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Spirituous Rules, Rule 36 of the Medicinal Preparations and Spirituous Rules was held to have been repealed and was not saved by the proviso to Section 21 of the MTPS Act and Rule 143 of the MTPS Rules.

16.1. In similar facts and circumstances of the case, when the Kerala Government imposed excise duty on rectified spirit from the distilleries under Section 17(f) of the Kerala Apgari Act read with Rule 13 of the Kerala Rectified Spirit Rules, 1972 and allowed the manufacturers of medicinal and toilet preparations to draw rectified spirit from the distilleries without payment of duty imposing a condition to claim the said privilege that they must comply with the conditions prescribed one of such conditions being the payment of cost of establishment under Section 14(a) of the Kerala Apgari Act read with Rule 16(4) of the Central Rules, the Apex Court held that the manufacture of the preparations must necessarily bear the burden as a licensee gets the service in return in lieu of such payments, as held by the Apex Court in Southern Pharmaceuticals v. State of Kerala, AIR 1981 SC 1863.

16.2. In the said decision (Southern Pharmaceuticals v. State of Kerala, AIR 1981 SC 1863), the Apex Court, in fact, after considering the ratio laid down in H. C & P. Works Ltd. v. State of Andhra Pradesh, AIR 1964 SC 1870, held that merely because the Central Rules made no provision for realisation of supervisory charges at the stage of manufacture of medicinal and toilet preparations, does not imply that the State has no power to prescribe the mode of supervision in a manufactory where preparations containing intoxicating liquor or intoxicating drugs are manufactured, or to ensure proper collection of duties, taxes and other dues payable under the Act, or to the proper utilisation of liquor or intoxicating drug; that the provision contained in Section 14(e) of the Abkari Act is clearly relatable to the State's power to make a law under Entry 8, read with Entry 51(a) List 2 of the Seventh Schedule; that thus, Section 14(e) of the Act is valid; and that there is no warrant for the submission that the framing of such an incidental provision like Rule 45(1) of the Central Rules takes away the State's power to recover supervisory charges from the licensee. The Apex Court, in

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Southern Pharmaceuticals v. State of Kerala, referred supra, thus distinguished the ratio laid down by the Constitution Bench of the Apex Court in H. C & P. Works Ltd. v. State of Andhra Pradesh, AIR 1964 SC 1870, as follows:-

> "16. The main thrust of the argument is the decision of this Court in Hyderabad Chemical and Pharmaceutical Works Ltd. v. State of Andhra Pradesh (1964) 7 SCR 376: (AIR 1964 SC 1870) which, we are afraid, is clearly distinguishable. There the Court was concerned with the question whether Rule 36 of the Medical Preparations and Spirituous Rules, 1345 Fasli, framed under the Hyderabad Abkari Act, 136 Fasli which provided that "the expenses of the establishment for the supervision of the work shall be borne by the pharmaceutical laboratory (licensee) as per the decision of the Commissioner of Excise", was still enforceable having regard to Section 21 of the Central Act and Rule 143 of the Central Rules. It was held that the effect of Section 21 of the Central Act was that so far as the Hyderabad Act applied to the use of alcohol in the manufacture of medicinal and toilet preparations, the Act must be deemed to have been repealed and, therefore. Rule 36 could not survive. In that case, the Court was concerned with the levy of supervisory charges at the stage of manufacture of medicinal and toilet preparations, and not with the levy of supervisory charges at the stage of the supply and utilisation of rectified spirit in the manufacture of medicinal and toilet preparations. This is clear from an observation at p. 380 (of SCR): (at p. 1872 of AIR) to the effect:
>
> > "The supervisory staff which has to be paid for under Rule 36 therefore is meant for the supervision of the manufacture of medicinal preparations and it is for that purpose only that expenses have to be borne by the laboratory concerned. The purpose of the rule therefore is clearly covered by the Act and the Rules framed thereunder and it cannot survive the Act and the Rules in

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view of Section 21 of the Act and Rule 143 of the 1956 Rules, and the proviso to Section 21 cannot be availed of by the State."

While repelling the contention that Rule 36 could still be good law as it was meant to carry out the general law relating to alcohol and intoxicating drugs, the Court pointed out that the Central Rules make no provision for recovery of supervisory charges, the intention being that the duty under the Act would cover all expenses for enforcing it and observed (1964) 7 SCR 376 at p.380: (AIR 1964 SC 1870 at p.1872)

"We are of opinion that there is no force in this contention either. In the first place, as we have already indicated, the main object of the supervisory staff mentioned in Rule 36 is to supervise the manufacture of medicinal preparations. In that connection the supervisory staff will certainly see that the alcohol supplied is used for the purpose for which it is supplied and is not used in any other manner. Rule 36 is only concerned with seeing that the manufacture of medicinal preparations is made properly and is done under the supervision of the establishment attached to each laboratory; and it is only incidentally that in that connection the establishment is also to see that the alcohol supplied is not used otherwise than for the purpose of manufacture."

Further, the Central Act, which the Court was considering, was a fiscal measure. The whole object and purpose of that Act is to levy a duty of excise on medicinal and toilet preparations containing alcohol. The Central Rules have mainly been framed to achieve this object. Rule 45(1) on which reliance was placed, reads:

45 (1). The officer-in-charge shall

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exercise such supervision as is required to ensure that alcohol issued for a certain preparation is added to the materials which go to make that preparation and that no portion of such alcohol is diverted to other purposes.

The provision is merely incidental to the main purpose i.e. collection of excise duty on medicinal and toilet preparations containing alcohol.

17. There can be no doubt that the impugned Act is relatable to Entry 8, List II of the Seventh Schedule. In Balsara's case 1951 SCR 682 at pp.705-6: (AIR 1961 SC 318 at p.325) the Court held that the expression "liquor" in Entry 31, List II of the Seventh Schedule to the Government of India Act, 1935, took within its sweep all liquids containing alcohol. In dealing with the question, Fazl Ali, J. observed: (at p.325)

> "The framers of the Government of India Act, 1935, could not have been entirely ignorant of the accepted sense in which the word 'liquor' has been used in the various excise Acts of this country and, accordingly I consider the appropriate conclusion to be that the word 'liquor' covers not only those alcoholic liquids which are generally used for beverage purposes and produce intoxication, but also all liquids containing alcohol. It may be that the latter meaning is not the meaning which is attributed to the word 'liquor' in common parlance especially when that word is prefixed by the qualifying word 'intoxicating', but in my opinion having regard to the numerous statutory definitions of that word, such a meaning could not have been intended to be excluded from the scope of the term 'intoxicating liquor' as used in Entry 31 of List II."

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It is not disputed by the appellants that the impugned Act does not levy a duty of excise on medicinal and toilet preparations containing alcohol, but they contend that, whatever be the intention, the State legislature had, in fact, encroached upon an occupied field. The contention is, in our opinion, wholly misconceived. The main purpose of the impugned Act is to consolidate the law relating to manufacture, sale and possession of intoxicating liquor and intoxicating drugs which squarely falls under Entry 8, List II of the Seventh Schedule, while the main object of the Central Act is to provide for the levy and collection of duties of excise on medicinal and toilet preparations containing alcohol falling under Entry 84, List I of the Seventh Schedule. When the framework of the two enactments is examined, it would be apparent that the Central and the State legislations operate in two different and distinct fields. In the matter of making rules or detailed provisions to achieve the object and purpose of a legislation, there may be some provisions seemingly overlapping or encroaching upon the forbidden field, but that does not warrant the striking down of the impugned Act as ultra vires the State legislature."

(emphasis supplied)

16.3. The Apex Court, in Southern Pharmaceuticals v. State of Kerala, AIR 1981 SC 1863, thus, interpreting the power of the Government to collect the cost of establishment charges towards Bonded Manufactory Officer and allied staff employed as fixed by the Government from time to time, held that the same is not levy of the duty of excise on medicinal and toilet preparations containing alcohol. The Apex Court also rejected the contention that the State legislature by framing such Rule to collect the cost of establishment charges under the provisions of the Rectified Spirit Rules, 1959 encroached upon the occupied field in view of the provisions of the MTPS Act and the Rules framed thereunder.

16.4. While dealing with the power of the State

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Government to collect supervisory charges, in Southern Pharmaceuticals v. State of Kerala, AIR 1981 SC 1863, the Apex Court has further held that:

> "22. The third ground that the levy of supervisory charges under Section 14(e) of the Act and Rule 16 (4) of the Kerala Rectified Spirit Rules, 1972, being in conflict with Rule 45(1) of the Central Rules, is constitutionally impermissible, cannot be accepted. The submission rests on a misconception as to the scope and effect of the decision of this Court in the Hyderabad Chemical and Pharmaceutical case (AIR 1964 SC 1870) . As we have already explained, the Court in that case was concerned with the levy of supervisory charges at the stage of manufacture of medicinal and toilet preparations and not with the levy of supervisory charges at the stage of supply and utilisation of rectified spirit in the manufacture of medicinal and toilet preparations. There can be supervision at both the stages. Merely because the Central Rules made no provision for realisation of supervisory charges at the stage of manufacture of medicinal and toilet preparations, does not imply that the State has no power to prescribe the mode of supervision in a manufactory where preparations containing intoxicating liquor or intoxicating drugs are manufactured, or to ensure proper collection of duties, taxes and other dues payable under the Act, or to the proper utilisation of liquor or intoxicating drug. The provision contained in Section 14(e) of the Act is clearly relatable to the State's power to make a law under Entry 8, read with Entry 51(a). List II of the Seventh Schedule. It necessarily follows that Section 14(e) of the Act is valid insofar as it provides that Commissioner may prescribe the size and nature of the establishment for such supervision and the cost of establishment and other incidental charges in connection with such supervision to be realised from the licensee. There is no warrant for the submission that the framing of such an incidental provision like Rule 45(1) of the Central Rules takes away the State's power to recover supervisory charges from the licensee.

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23. There still remains the question whether the levy of supervisory charges must be ragarded as a fee and, therefore, cannot be sustained, there being no quid pro quo. In support of the contention, reliance is placed on the decision in Indian Mica Micanite Industries v. State of Bihar (1971) 2 SCC 236 : (AIR 1971 SC 1182).

24. The distinction between a "tax" and a "fee" is well settled. The question came up for consideration for the first time in this Court in the Commissioner, H.R.E., Madras v. Lakshmindra Thirtha Swamiar of Shirur Mutt 1954 SCR 1005: (AIR 1954 SC 282). Therein, the Court speaking through Mukherjea, J. quoted with approval the definition of "tax" given by Latham, C.J. in Matthews v. Chicory Marketing Board 60 Comm. LR 263 (Aus). In that case, the learned Chief Justice observed:

> "A tax is a compulsory exaction of money by public authority for public purposes enforceable by law and is not payment for services rendered."

Dealing with the distinction between "tax" and "fee" the learned Judge observed 1954 SCR 1005 at pp.1040-2: (AIR 1954 SC 282 at pp. 295, 296)

> "It is said that the essence of taxation is compulsion, that is to say, it is imposed under statutory power without the tax payer's consent and the payment is enforced by law. The second characteristic of tax is that it is an imposition made for public purpose without reference to any special benefit to be conferred on the payer of the tax. This is expressed by saying that the levy of tax is for the purposes of general revenue, which when collected forms part of the public revenues of the State. As the object of a tax is not to confer any

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special benefit upon any particular individual, there is, as it is said, no element of quid pro quo between the tax payer and the public authority. Another feature of taxation is that as it is a part of the common burden, the quantum of imposition upon the tax payer depends generally upon his capacity to pay.

Coming now to fees, a 'fee' is generally defined to be a charge for a special service rendered to individuals by some governmental agency. The amount of fee levied is supposed to be based on the expenses incurred by the Government in rendering the service, though in many cases the costs are arbitrarily assessed. Ordinarily, the fees are uniform and no account is taken of the varying abilities of different recipients to pay. These are undoubtedly some of the general characteristics, but as there may be various kinds of fees, it is not possible to formulate a definition that would be applicable to all cases.

* * *

If, as we hold, a fee is regarded as a sort of return or consideration for services rendered, it is absolutely necessary that the levy of fees should on the face of the legislative provision, be co-related to the expenses incurred by Government in rendering the services."

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The same view was reiterated by this Court in Mahant Sri Jagannath Ramanuj Das v. State of Orissa, 1954 SCR 1046: (AIR 1954 SC 400) and in Ratilal Panachand Gandhi v. State of Bombay 1954 SCR 1055 : (AIR 1954 SC 388).

25. "Fees" are the amounts paid for a privilege, and are not an obligation, but the payment is voluntary.

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Fees are distinguished from taxes in that the chief purpose of a tax is to raise funds for the support of the Government or for a public purpose, while a fee may be charged for the privilege or benefit conferred, or service rendered or to meet the expenses connected therewith. Thus, fees are nothing but payment for some special privilege granted on service rendered. Taxes and taxation are, therefore, distinguishable from various other contributions, charges, or burdens paid or imposed for particular purposes and under particular powers or functions of the Government. It is now increasingly realised that merely because the collections for the services rendered or grant of a privilege or license, are taken to the consolidated fund of the State and are not separately appropriated towards the expenditure for rendering the service is not by itself decisive. That is because the Constitution did not contemplate it to be an essential element of a fee that it should be credited to a separate fund and not to the consolidated fund. It is also increasingly realised that the element of quid pro quo stricto senso is not always a sine qua non of a fee. It is needless to stress that the element of quid pro quo is not necessarily absent in every tax. We may, in this connection, refer with profit to the observations of Seervai in his Constitutional Law, to the effect: (Constitutional Law of India by H.M.Seervai 2nd Edn. Vol.2, p.1252, para 22, 39):

> "It is submitted that as recognised by Mukherjea, J. himself, the fact that the collections are not merged in the consolidated fund, is not conclusive, though that fact may enable a court to say that very important feature of a fee was present. But the attention of the Supreme Court does not appear to have been called to Article 266 which requires that all revenues of the Union of India and the States must go into their respective consolidated funds and all other public moneys must go into the respective public

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> accounts of the Union and the States. It is submitted that if the services rendered are not by a separate body like the Charity Commissioner, but by a government department, the character of the imposition would not change because under Article 266 the moneys collected for the services must be credited to the consolidated fund. It may be mentioned that the element of quid pro quo is not necessarily absent in every tax."

Our attention has been drawn to the observations in Kewal Krishan Puri v. State of Punjab, (1979) 3 SCR 1217 at p.1230: (AIR 1980 SC 1008 at p.1015):

> "The element of quid pro quo must be established between the payer of the fee and the authority charging it. It may not be the exact equivalent of the fee by a mathematical precision, yet, by and large, or predominantly, the authority collecting the fee must show that the service which they are rendering in lieu of fee is for some special benefit of the payer of the fee."

To our mind, these observations are not intended and meant as laying down a rule of universal application. The Court was considering the rate of a market fee, and the question was whether there was any justification for the increase in rate from Rs 2 per every hundred rupees to Rs 3. There was no material placed to justify the increase in rate of the fee and, therefore, it partook the nature of a tax. It seems that the Court proceeded on the assumption that the element of quid pro quo must always be present in a fee. The traditional concept of quid pro quo is undergoing a transformation.

26. It seems obvious that, in the case of a manufacturer of medicinal and toilet preparations containing alcohol in a bonded manufactory, the

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imposition of the cost of establishment under Section 14(e) of the Act calculated in accordance with the nature and extent of that establishment could not be said to be an imposition of a duty of excise, but is a price for his franchise to carry on the business. If an exaction is to be classed as a duty of excise, it must, of course, be a tax, its essential distinguishing feature is that it is a tax imposed "upon" or "in respect of" or "in relation to" goods: Matthews v. Chicory Marketing Board 60 Com LR 263 (Aus). The exaction is in truth, as it purports to be, simply a fee payable as a condition of a right to carry on a business.

27. No one has a fundamental right to the supply of rectified spirit which is an intoxicating liquor. It is up to the State to control and regulate its supply from a distillery or a spirit warehouse in the State under and in accordance with the terms and conditions of a license or permit its import from outside by grant of a privilege and charge a fee for the same. A fee may be charged for the privilege or benefit conferred, or service rendered, or to meet the expenses connected therewith. A fee may be levied to meet the cost of supervision and may be, something more. It is in consideration for the privilege, licence or service. The State is undoubtedly entitled to levy excise duty on the rectified spirit issued from a distillery under Section 17(f) of the Act read with Rule 13 of the Kerala Rectified Spirit Rules, 1972, but it refrained from making any such levy by reason of Rule 21 of the Central Rules and has, therefore, by proviso to Rule 8, allowed a manufacturer of medicinal and toilet preparations to draw rectified spirit from a distillery without payment of duty. It is thus a privilege conferred on the licensee. To claim the privilege he must comply with the conditions prescribed. If one of the conditions is the payment of cost of establishment under Section 14(e) of the Act read with Rule 16(4) of the Central Rules, the manufacturer of such preparations must necessarily bear the burden as the licensee gets

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services in return in lieu of such payment."

(emphasis supplied)

Accordingly, the Apex Court upheld the power of the Kerala Government to collect the establishment charges.

16.5. It is, therefore, not in dispute that even though the MTPS Act was enacted by the Parliament, the enforcement of the same for levy, collection and appropriation of the duty imposed and collected under the Act is left to the State Government.

17. It is only following the said ratio, the Government by G.O.Ms.No.19, Prohibition and Excise (III) Department, dated 6.1.1983 inserted clause (c) to Rule 11 of the Rectified Spirit Rules, 1959, referred to above, whereunder the cost of the Bonded Manufactory Officers and allied staff employed by the licensees who use duty not paid alcohol for the preparation of medicinal and toilet preparations at the rate fixed by the Commissioner from time to time shall be recovered from the licensees.

18.1. The question whether the State is empowered to legislate to control the alcohol industry also came up for consideration before the Apex Court in Synthetics & Chemicals Ltd. v. State of U.P., AIR 1990 SC 1927 , wherein the Constitution Bench of the Apex Court held as follows,

"85. The position with regard to the control of alcohol industry has undergone material and significant change after the amendment of 1956 to the IDR Act. After the amendment, the state is left with only the following powers to legislate in respect of alcohol.

(a) It may pass any legislation in the nature of prohibition of potable liquor referable to entry 6 of list II and regulating powers.

(b) It may lay down regulations to ensure that non-potable alcohol is not diverted and misused as a substitute for potable alcohol.

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(c) The state may charge excise duty on potable alcohol and sales tax under entry 52 of list II. However, sales tax cannot be charged on industrial alcohol in the present case, because under the Ethyl Alcohol (Price Control) Orders, sales tax cannot be charged by the state on industrial alcohol.

(d) However, in case state is rendering service as distinct from its claim of so-called grant of privilege, it may charge fees based on quid pro quo."

(emphasis supplied)

18.2. The ratio laid down by the Apex Court in SYNTHETICS CHEMICALS LIMITED case, referred supra, irons out the doubt that the State is entitled to lay down regulations not only to ensure that the non-potable alcohol is not diverted or misused as a substitute for potable alcohol, but also in case the State is rendering any service as distinct from its claim of so called grant of privilege it may charge fees based on the quid pro quo, inasmuch as the impugned amendment is only to complement the provisions of the Central Act but not in conflict with the same, because even though the MTPS Act was enacted by the Parliament, the enforcement of the same for levy, collection and appropriation of the duty imposed and collected under the Act is left to the State Government. The power of the State Government to frame the impugned Government Order cannot be attacked for want of legislative competency as rightly held by the learned single Judge.

19. The next grievance of the petitioner that the impugned rule does not provide for any guideline for fixing the charges to be borne for the appointment of the Bonded Manufactory Officers with reference to the capacity of the units, is misconceived as the Rule itself provides that the rates at which the cost of establishment shall be fixed by the Commissioner from time to time and shall be intimated to the licensee in writing and therefore, as rightly contended by the learned Additional Advocate General, if the petitioners are aggrieved by such fixation of the

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rates, they are still at liberty to work out their rights separately challenging such consequential proceedings of the Commissioner in exercise of the powers conferred under Rule 11(c) of the Rectified Spirit Rules.

20. The further contention that once the retail price of the medicinal preparations are governed under the Drug Price (Control) Order, 1979 and the price of the medicinal preparations are fixed under the formula provided thereunder, the establishment charges now proposed to be borne by the petitioners in respect of the Excise Officers, who were deputed under the impugned Rules, cannot be taken into account and as a result, the petitioners are constrained to bear the said cause personally, cannot be accepted, as the licensees, as explained by the learned Advocate General, are always at liberty to apprise the above facts to the authorities concerned to bring the impugned establishment charges under the calculation of retail prices of formulations prescribed under clause 7 of the order, and if their claim to include the expenses for calculating the retail prices is rejected, they are still at liberty to work out their remedies in appropriate proceedings, if they are so advised, under the provisions of the Drugs Price (Control) Order, 1979. Hence, in our considered opinion, the impugned rule contains inbuilt guidelines and any grievance of the petitioners with regard to any such consequential proceedings in implementing the Rule can always be agitated by the petitioners in appropriate independent proceedings.

21. The impugned rule is, therefore, held to be constitutionally valid, as held by the learned Single Judge.

IX – ISSUE (ii) & THE LEGAL POSITION

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22. Issue (ii) – Assuming Rule 11(c) of the Rectified Spirit Rules, 1959 is constitutionally valid, whether the same is applicable to and enforceable against the petitioners?

23. The supplementary question that arises for our consideration in these appeals is to the finding of the learned single Judge that the impugned rule is not

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applicable to the writ petitioners and that the same cannot be enforced for want of service rendered by the Government for establishment of the Bond Manufactory Officers and allied staff employed by the licensees for lack of quid pro quo.

24.1 In our considered opinion, once the power to frame the regulations for levying fee is held to be constitutionally valid, the only point that arises for our consideration is whether or not the impugned Rule is applicable to the petitioners in the light of the subsequent development in the concept of quid pro quo.

24.2. The three judges of the Apex Court in B.S.E. Brokers' Forum, Bombay v. Securities And Exchange Board of India, (2001) 3 SCC 482 = AIR 2001 SC 1010, interpreting the concept of 'quid pro quo' held as follows:

> "The traditional concept of quid pro quo in a fee has undergone considerable transformation. So far as the regulatory fee is concerned, the service to be rendered is not a condition precedent and the same does not lose the character of a fee provided the fee so charged is not excessive. It is also not necessary that the services to be rendered by the collecting authority should be confined to the contributories alone. Section 11 of the Securities and Exchange Board of India Act requires the Board to undertake various activities to regulate the business of the securities market which requires constant and continuing supervision including investigation and instituting legal proceedings against the offending traders, wherever necessary. Such activities are clearly regulatory activities and the Board is empowered under Section 11(2)(k) to charge the required fee for the said purpose, and once it is held that the fee levied is also regulatory in nature then the requirement of quid pro quo recedes to the background and the same need not be confined to the contributories alone."
>
> ...
>
> The plea that the amount to be collected by the Board by way of fee will be in region of over 400

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crores and such a large amount is not reasonably required by the Board for the purpose of implementing the objectives of the Act is not tenable. Considering the various statutory obligations cast on the Board and the fact that the Government of India has already delegated to the Board the functions under the SCR Act, the Depositories Act are also some of the functions under the Companies Act. It is clear that the Board certainly requires substantial sums of money.

The fee in question being primarily a regulatory fee the argument that the service rendered by the Board should be confined to the contributories alone, cannot be accepted. Since the amount collected under the impugned levy is being spent by the Board on various activities of the stock and securities market with which the petitioners are directly connected, the fact that the entire benefit of the levy does not accrue to contributories, i.e., the petitioners would not make the levy invalid."

(emphasis supplied)

24.3. While enlarging the concept of quid pro quo, the Apex Court in State of U.P. v. Vam Organic Chemicals Ltd.,(2004) 1 SCC 225 = AIR 2003 SC 4650 held that where the fee is charged for the service rendered, service need not be one which is voluntarily taken but it may be given by compulsion also. Elaborating the above ratio, the Apex Court in the said decision held as follows:

"The service need not necessarily be one which is voluntarily taken by the person responsible for paying the fee. There may be an element of compulsion or coerciveness present. The word 'service' in the context of a fee could, therefore, include a levy for a compulsory measure undertaken vis-a-vis the payer in the interest of the public. This 'coercive' measure has been subsequently judicially clarified to mean a 'regulatory measure.' But in the case of both kinds of services whether compulsorily imposed or voluntarily accepted, there would have to be a correlation between the levy imposed and the counter payment or quid pro quo.

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However, co-relationship between the levy and the services rendered is one of general character and not of mathematical exactitude. All that is necessary is that there should be a reasonable relationship between levy of the fee and the service rendered. Contrariwise when there is no such correlation, the levy, despite its nomenclature is in fact a tax."

(emphasis supplied)

25. The service rendered by the Bonded Manufactory Officers, in the instance case, under Rule 40 to 45 of the MTPS Rules, which detail the functions of the officer-in-charge of the bonded manufactories with respect to the maintenance of accounts in proper forms and registers, size of establishment, collection of duty and penalty etc. are to be tested in the light of the recent development in the concept of quid pro quo, vide (i) B.S.E. Brokers' Forum, Bombay v. Securities And Exchange Board of India, (2001) 3 SCC 482 = AIR 2001 SC 1010; and (ii) State of U.P. v. Vam Organic Chemicals Ltd.,(2004) 1 SCC 225 = AIR 2003 SC 4650. In the case of licensees holding L2 license, who use the duty not paid alcohol, if tested within the parameters laid down by the Apex Court in the above decisions (i) B.S.E. Brokers' Forum, Bombay v. Securities And Exchange Board of India, (2001) 3 SCC 482 = AIR 2001 SC 1010; and (ii) State of U.P. v. Vam Organic Chemicals Ltd.,(2004) 1 SCC 225 = AIR 2003 SC 4650, we are satisfied that the impugned Rule 11(c) of the Rectified Spirit Rules, 1959 is applicable to the petitioners, inasmuch as the kind of service rendered by the Bonded Manufactory Officers is a matter of statutory compulsion but does not depend upon either demand or acceptance of the licensee.

X – DECISION

26. Hence, all the contentions advanced on behalf of the petitioners fail, as it is difficult to sustain the order of the learned Single Judge in holding that the impugned Rule is not applicable to the case of the petitioners for lack of quid pro quo in view of the ratio laid down by the Apex Court recently on the concept of quid pro quo, referred to above.

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27. The writ appeals are, therefore, allowed, however without prejudice to the right of the writ petitioners to work out their rights in fixing the retail price for the medicines under the Drug Price (Control) Order, 1979 in appropriate proceedings and also to challenge the rates fixed by the Commissioner from time to time, if they are so aggrieved while implementing Rule 11(c) of the Rectified Spirit Rules, 1959 in appropriate and separate proceedings and if they are so advised.

In the result, these writ appeals are allowed with the above observations. No costs.

kst/sasi

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To:

1. The Commissioner & Secretary
   to the Govt. of Tamilnadu
   Prohibition and Excise Department
   Fort St.George, Madras-9.

2. The Assistant Commissioner (Excise)
   Collector's Office, Madras.

3. The Collector of Madras,
   Collectorate, Madras.

4. The Collector and Assistant
   Commissioner of Excise,
   Chingleput District
   Chingleput.

5. The Assistant Commissioner (Excise)
   Collector's Office, Madurai.

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6. The Commissioner for Prohibition
   and Excise, Chepauk, Madras-5.

+ One CC to M/s G.M. Mani Associates, SR 52143

+ One CC to Mr. S. Ramasamy, Advocate SR 52353

+ One CC to Govt. Pleader SR 52198

W.A.Nos.125 to 127 of
1999 and 532 of 1996

1.12.2004

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